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No. 00-_____

In The Supreme Court of the United States

Kathleen Griest and George Griest,

Petitioners,

v.

Andrew Edward Canepa, P.S.P.; Jeffrey E. Hontz, P.S.P.; Commonwealth of Pennsylvania; Paul J. Evanko, the Commissioner of the Pennsylvania State Police in His Individual Capacity ; Glen Walp, the Former Commissioner of the Pennsylvania State Police in his Individual Capacity,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

David W. Wolf
Counsel for Petitioner

The Law Offices of David W. Wolf
225 South Fifteenth Street, Suite 805
Philadelphia, Pennsylvania 19102
(215) 546-7450

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995) requires a circuit court to decline the exercise of jurisdiction on an appeal of the denial of summary judgment on a qualified immunity defense, when the denial is the result of the existence of controverted issues of fact.

2. Whether an inquiry into the subjective intent of a government official is appropriate for the purpose of determining whether an official is entitled to qualified immunity in a First Amendment retaliation case against a government official.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The parties to the proceeding are fully set forth in the caption.

No designation of corporate relationships, pursuant to Supreme Court Rule 29.6, is required in this case.

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PETITION FOR A WRIT OF *CERTIORARI*

This petition presents two (2) important issues of federal law that have created significant confusion among the federal courts of appeals. First, in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court held that a defendant entitled to invoke a qualified immunity defense may not appeal a district court's decision to deny summary judgment insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue material fact for trial. The interpretation and application of the *Johnson* doctrine has been inconsistent at best. Indeed, circuit courts, while paying lip service to the restrictions on jurisdiction imposed by the *Johnson* decision, have widely ignored or misapplied its' mandates.

The importance of this issue cannot be overstated. By exercising jurisdiction over appeals from denials of summary judgment which was granted based on the existence of fact-based issues, circuit courts across this nation have engaged in a fact-sifting exercise that clearly is prohibited by *Johnson*. In addition, by exercising jurisdiction over these appeals in contravention to *Johnson*, courts are wasting valuable judicial resources and, more importantly, depriving plaintiffs of their right to trial by jury in those cases where the trial court has determined that a genuine fact dispute exists sufficient to preclude summary judgment.

Second, this petition seeks clarification on another important area of federal qualified immunity law, that is, whether in a First Amendment retaliation case against a government official an inquiry into the

subjective intent of the official is appropriate for the purpose of determining whether the official is entitled to qualified immunity. The Court failed to rule on this issue in *Crawford-El v. Britton*, 523 U.S. 574 (1998), and, since that time, at least two circuit courts that have addressed the issue have reached divergent results. Clarification and guidance by this Court are necessary to provide a uniform federal rule in such cases. This petition should be granted in order to establish that rule.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is "unreported - not precedential" and appears in the Appendix at pages A1-A20. The opinion of the United States District Court for the Middle District of Pennsylvania appears in the Appendix at pages A21-A42.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on March 22, 2000 and denied Petitioners request for rehearing en banc on April 28, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Early in the morning of April 13, 1995, Petitioner Mrs. Kathleen Griest, a sixty one (61) year old, 5'1" grandmother and retired homemaker, was directed by her physician to the Hospital on an emergency basis. Mrs. Griest, had been treated during the previous day for an abscessed tooth, and her physician feared she might be suffering from toxic septicemia. Mrs. Griest's husband had left for work on the night shift and their daughter, Kathleen Williams, had come to stay with Mrs. Griest overnight.

Mrs. Griest was well enough when she spoke with her family physician to be advised by him to drive herself to the hospital, which was located about thirty (30) miles from Petitioner's rural home. Her daughter was not familiar with operating Mrs. Griests' large family sedan and Mrs. Griest preferred, despite her pain and distress, to drive her own car.

Mrs. Griest and her daughter had an uneventful drive until they encountered a vehicle parked on the shoulder of Route 33, a limited access highway. The unmarked vehicle had a light on it and Mrs. Griest and her daughter believed that the operator, Respondent Canepa, was either a fireman or policeman who might be able to help expedite their travel to the hospital.

Respondent Canepa, a plain-clothes investigator in his barracks' Criminal Investigation Unit, had run out of gas in his police car and was angry and harsh before he even spoke with Mrs. Griest. Respondent

Canepa is 5'7 3/4", 200 pounds and can bench press his own weight. During the Griests' first spoken contact with Respondent Canepa, Ms. Williams advised that her mother was very sick, had been diagnosed as suffering from RSD (Reflex Sympathetic Dystrophy), which she described as "pain throughout your body," and in a lot of pain. RSD is also known as chronic pain syndrome, shoulder-hand syndrome, causalgia or Sudeck's Atrophy. Mrs. Griest wanted assistance getting to the hospital immediately and did not wish to sit idly by the side of the road. Respondent Canepa decided that Mrs. Griest should not drive her car and he grabbed Mrs. Griest's keys from her ignition without her permission. After she protested the seizing of her keys, Respondent Canepa ordered her out of her car.

Respondent Canepa partially entered Mrs. Griest's car, reached over, demanded the keys and then forcibly took them out of the ignition. Mrs. Griest was quoted by the intake nurse at the hospital, as stating "police officer entered the front seat of the car and demanded her keys. Situation developed – police officer ordered her out of the car. Situation worsened...". Kathleen Williams also confirmed that Canepa partially entered Mrs. Griest's vehicle; demanded her keys; raised his voice when she asked to see his identification and then harshly again demanded her keys; removed the keys from the ignition himself when she refused to promptly hand them over; and, then, ordered her out of the car with a "nasty" "hollering and screaming" tone.

Mrs. Griest hobbled out of her car to the shoulder of the road where she stated impatiently and sarcastically she would "walk to the hospital" which

was many miles away, if necessary. This was not actually possible. Mrs. Griest had been to her orthopedic doctor earlier that week, had a herniated lumbar disc in her back and had left her cane in the car when Respondent Canepa ordered her out of her car. At this point, Respondent Canepa decided to use force to restrain Mrs. Griest.

Respondent Canepa grabbed Mrs. Griest's arms and hands, squeezed them and wrenched them around behind her back and handcuffed her. Mrs. Griest fainted from the intense pain and fell to the ground. It was only after Respondent Canepa wrenched Mrs. Griest back up, pulling back up on her arms and lifting and grabbing her around her chest and ribs, that Respondent Canepa acquiesced to Ms. Williams' repeated pleas to remove the handcuffs.

Mrs. Griest fainted from the pain inflicted by Respondent Canepa primarily because her right arm had not been behind her back for a number of years due to her painful RSD condition and the forcable wrenching of her atrophied limb contributed to her falling to the ground. After Mrs. Griest fainted, Respondent Canepa later testified that he yanked her up by her handcuffed arms because he thought she was faking. This caused Mrs. Griest to suffer additional bruising on her arms, chest and back.

Rather than immediately transport Mrs. Griest as her doctor had directed, she was detained for nearly an hour until she was loaded into an ambulance by Respondent Canepa's partner (Tpr. Gerkovich), who had since arrived. While Mrs. Griest was being put in the ambulance by Tpr. Gerkovich, she was heard

loudly complaining about her treatment by Respondent Canepa and threatened to sue for being handcuffed and put to the ground. Respondent Canepa was near the ambulance getting a Band-Aid on his thumb for a minor scratch.

At the scene, one Corporal Robert Wertz, now a ranking officer in the Pennsylvania State Police, learned that Respondent Canepa was claiming that his thumb had sustained a minor scratch during his handling of Mrs. Griest. Wertz thereupon ordered Respondent Jeffrey Hontz, another Pennsylvania State Police Trooper, to conduct an investigation and charge Mrs. Griest with assault. This occurred after Mrs. Griest was heard making threats to sue for excessive force while being loaded into the ambulance. Ambulance personnel were quoted as stating: "she [Mrs. Griest] continually complained about being abused by the police by being thrown to the ground after pulling over to get assistance. She threatened to sue." Respondent Canepa was very close to Mrs. Griest when she threatened to sue.

Hontz began his investigation by contacting the Griests who referred him to a local attorney. The attorney explained Mrs. Griest's medical emergency and referred Hontz to their family doctor, who forwarded a letter dated April 24, 1995 to Hontz which explained the doctor's understanding of the events.

As a result of the stress of the incident and Respondent Hontz's commencement of the criminal investigation, Mrs. Griest had a nervous breakdown and was eventually hospitalized by her husband a week

later for mental health care for a period of thirty days in May of 1995.

Between Hontz's receipt of the doctor's letter dated April 24, 1995, which he notes in an entry dated May 8, 1995 and August 15, 1995, there are no entries whatsoever in Hontz's official investigation report. On August 15, 1995, Hontz's spoke with the doctor once again and was informed that Mrs. Griest was doing poorly and that a prosecution would adversely affect her health. Hontz writes in his report that he then contacted and "updated" Monroe County Assistant District Attorney David Skutnik, who told Hontz to "sit on the case for a while and get back to me".

On October 12, 1995, the Griest's attorney forwarded a statutory tort notice pursuant to 42 P.C.S.A. § 5522 to the Office of the Chief Counsel of the Pennsylvania State Police and to the Attorney General's Office. The Griest's issuance of a tort notice letter filtered down through the State Police chain of command and was brought to the attention of Respondents. Various telephone calls were placed between Canepa's and Hontz's separate Troop barracks wherein Canepa and superior officers in both Troops inquired of Hontz as to the status of his investigation and either explicitly or implicitly pressured him to charge Mrs. Griest with aggravated assault, a felony, for having allegedly scratched Trooper Canepa's thumb. No new facts or evidence were uncovered by the Respondents in the criminal investigation of Mrs. Griest after August 15, 1995. The only new development in this period concerning the criminal case was the Griests' tort notice.

On October 19, 1995, a week after the Griests sent their tort notice, Sgt. Baranoski (of Respondent Canepa's barracks) telephoned Respondent Hontz and directed him to move the prosecution forward. On that same date, just six days after Mrs. Griest's tort notice had been delivered to State Police Headquarters on October 13, 1995, Sgt. Baranoski was called by Cpl. Junkin. Cpl. Junkin was the immediate supervisor of both Respondent Canepa and Tpr. Gerkovich in the Criminal Investigation Unit in which all three were assigned. The three officers worked in a "tight circle". Tpr. Gerkovich was the officer who had helped load Mrs. Griest into the ambulance. Thus, he was with her when she was heard loudly threatening to sue by the ambulance personnel for having been "put to the ground". Notably, it was Cpl. Junkin who informed Sgt. Baranoski that the tort notice had been issued by Mrs. Griest and then made a follow-up call to Tpr. Hontz. Baranoski's notes state: "Wanted to know if any charges were filed in case. P[ennsylvania] S[tate] P[olice] being sued. Expressed displeasure with Hontz's investigation and progress. Spoke with Hontz advised him to resolve matter by 10/25/95 with District Attorney's office".

The county district attorney's office did not, by policy, rule of court or otherwise hold the authority to approve any of the charges against Mrs. Griest. The charges were by rule of law solely within Respondent Hontz's authority to swear out. The county district attorney's office's approval was therefore both procedurally and substantively gratuitous.

Just ten days after the Griests' tort notice was received at the Pennsylvania State Police headquarters

but months after the incident, Respondent Hontz swore out a probable cause affidavit and a criminal information charging Mrs. Griest with one count of second degree felonious aggravated assault and two counts of simple assault. The local district justice, however, refused to certify the charges and instead contacted the County Attorney which resulted in the charges being downgraded to the misdemeanor crime of simple assault along with summary offenses of harassment and disorderly conduct.

Respondent Hontz' probable cause affidavit is false and misleading in many material respects. First, it states that Ms. Williams, told Respondent Canepa upon their first speaking on April 13, 1995 that Mrs. Griest needed an ambulance because she "wasn't acting properly." This statement implied that Mrs. Griest was mentally unstable whereas Respondent Canepa's testimony in the criminal hearing stated that Ms. Williams immediately informed him that her mother was "very sick"; that "they were on their way to the hospital"; and, that Ms. Williams initially had specifically informed him that Mrs. Griest suffered from RSD. In his deposition, Respondent Canepa testified that Ms. Williams told him ". . . she is very ill. She doesn't feel good at all".

Omission of these important and material facts and the use, instead, of the phrase "wasn't acting properly" falsely attributed to Ms. Williams was intended to mislead and confuse the reader of the probable cause affidavit concerning the physical nature of Mrs. Griest's medical distress. The falsities created the impression that Mrs. Griest, who had just spoken with her family doctor and was advised to drive

her car, was mentally unstable. The truth was that Mrs. Griest was a stable person who had never had any history of mental instability or psychiatric treatment in her entire life until suffering from her encounter with Respondent Canepa.

The probable cause affidavit also omits mention of other material facts. There is no mention that Mrs. Griest's keys were taken by Respondent Canepa prior to Mrs. Griest being ordered from her car or that Mrs. Griest was actually handcuffed behind her back for several minutes and only released after her daughter begged Canepa several times and reiterated that her mother suffered from RSD in her right arm. There is a patently false statement that Respondent Canepa "tried to get [Mrs. Griest] *off the highway* before she got struck by any on-coming traffic (emphasis added)"; in his deposition Respondent Canepa testified that Mrs. Griest was not any time on the highway but, rather, remained on the paved shoulder at all times.

These various falsities and omissions served the obvious intended result: rather than portraying the true facts that Mrs. Griest presented with a medical emergency, the probable cause affidavit instead portrayed Mrs. Griest as being mentally or emotionally unstable. Indeed, upon being taken to the hospital, Mrs. Griest was evaluated only by the psychiatric admissions staff (she received no attention for her tooth abscess or feared septicemia) and was not admitted for mental care but released.

As noted, even with the falsities and misleading statements, the local district justice rejected and refused to approve the aggravated assault and simple

assault charges and instead contacted the first county attorney to downgrade the charges. Mrs. Griest was then acquitted of the crime of simple assault. The acquital was entered by the district justice despite the trial appearance of the assistant county attorney who, at the special request of the state police, appeared to prosecute Mrs. Griest on the summary offenses. Unique aspects of this prosecution against Mrs. Griest include the fact that neither the prosecuting attorney, Mr. Skutnik, nor Respondent Hontz could recall any other case in their long careers where the county attorney was specifically requested to prosecute a summary disorderly conduct charge as the prosecution did here.

Ultimately, the prosecuting attorney conceded in his deposition that his appearance as prosecutor by special request of the state police at the summary disorderly conduct hearing "presented a better chance of a successful prosecution". He also acknowledged that once the Griests' tort notice had issued, there was an added incentive to secure a conviction because that would rule out potentially viable claims, e.g., malicious prosecution against the state police. However, Mrs. Griest was completely vindicated as to any and all criminal charges filed against her.

Most salient, perhaps, in connection with the retaliatory prosecution claim is that although Respondent Hontz was supposedly soft-pedaling his investigation of Mrs. Griest in order to monitor Mrs. Griest's medical condition, prior to issuing the probable cuase affidavit, Hontz never re-contacted the Griest's doctor after August 15, 1995 for a medical update.

In addition to the many conflicting facts surrounding the prosecution of Mrs. Griest, Respondent Canepa testified to or officially reported markedly different versions of what actually happened in attempting to explain why he could have possibly found it reasonable to handcuff and put to the ground a sixty one year old retired grandmother in the middle of a medical emergency. The versions differ substantially (and in material respects) with one having Mrs. Griest emerging from her car and walking back to Respondent Canepa's vehicle and others having Mrs. Griest emerge while Respondent Canepa claimed he was in the process of using his authority to order Mrs. Williams to seize Mrs. Griest's keys.

Respondent Canepa admitted he is not sure exactly when or how his thumb received a minor scratch about the size of a thumbtack head. He received a Band-Aid from the medical personnel at the scene, never went to a doctor and that there is no scar at all at the location wherein he claims he was scratched.

Mr. and Mrs. Griest filed this Section 1983 civil rights action in April of 1997 and their Amended Complaint was filed in June of 1997. The parties stipulated to the dismissal of commissioners Evanko and Walp and focused the issues on the conduct of the arresting and prosecuting state police troopers, Respondents Canepa and Hontz, respectively. The Griests moved for partial summary judgment on their Section 1983 retaliatory prosecution claim and Respondents moved for complete summary judgment. The district court denied Petitioner's motion and denied Respondent's motion with regard to Mrs. Griest's

excessive force and false arrest claims against Respondent Canepa and the retaliatory prosecution claim against Hontz, all because the trial court conclusively determined that there were "myriad" genuine issues of disputed material fact concerning: (a) the specific events that occurred during the incident and initial arrest of Mrs. Griest; (b) the nature and validity of the information communicated by and between Respondent Hontz and the county prosecutors office and/or set forth on Hontz' probable cause affidavit; and (c) the penultimate issue of why the filing of criminal charges was delayed.

The United States Court of Appeals for the Third Circuit affirmed the denial of summary judgment of the excessive force claim against Respondent Canepa but reversed the district court's denial of summary judgment on the Fourth Amendment unlawful arrest claim against Respondent Canepa and the First Amendment-based retaliatory prosecution claim against Respondent Hontz.

The panel rejected Petitioner's argument that no jurisdiction obtained under *Johnson v. Jones*, 515 U.S. 304 (1995) despite the panel's failure to articulate any abstract issue of law upon which the trial court might have erred. The panel then supported its decision to reverse the trial court on the basis of its disagreement with the trial court's view as to the sufficiency of the evidence identified by Petitioner's as supporting those claims. The panel also rejected Petitioner's argument that the evidence and case law supported a subjective finding of unlawful retaliation. The Petitioner's timely petition for rehearing en banc was denied on April 28, 2000 by the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

In an address before the American Bar Association on September 7, 1949, Chief Justice Vinson noted that the function of the United States Supreme Court is "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. . . . Those of you whose petitions for *certiorari* are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, at vi. These words are particularly apt here.

Mr. and Ms. Griest respectfully request that this Court resolve the confusion among the circuits with respect to the application of this Court's jurisdictional doctrine in *Johnson*, as well as provide clarification with respect to the issue of "subjective" intent in the constitutional tort qualified immunity analysis, an issue which this Court accepted but failed to address in *Crawford-El.*

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE CONFUSION AMONG THE CIRCUITS EXISTS ON THE ISSUE OF WHETHER *JOHNSON* REQUIRES A CIRCUIT COURT TO DECLINE THE EXERCISE OF JURISDICTION ON AN APPEAL OF THE DENIAL OF SUMMARY JUDGMENT ON A QUALIFIED IMMUNITY DEFENSE WHEN THE DENIAL IS THE RESULT OF THE EXISTENCE OF CONTROVERTED ISSUES OF FACT.

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate only if (1) there are no genuine issues of material fact; and (2) based on the undisputed facts, the movant is entitled to judgment as a matter of law. This Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995) requires that a circuit court decline from exercising jurisdiction over an appeal of the denial of summary judgment on a qualified immunity defense when the denial is the result of the existence of controverted issues of fact. As of the time of the filing of this petition, numerous courts of appeals had ruled in conflicting ways on the issue of whether this Court's decision in *Johnson* precludes an appellate court from exercising jurisdiction to review a district court's order denying qualified immunity "insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." See 515 U.S. at 320. Accordingly, this Court's guidance is necessary to resolve this conflict.

A. *The Recent Evolution of the Collateral Order Doctrine In Qualified Immunity Cases*

In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) this Court held that courts of appeals have jurisdiction to review district court orders denying summary judgment on a qualified immunity defense under the collateral order doctrine. The jurisdictional rule established by *Mitchell* was modified by the Court in *Johnson*. Specifically, in *Johnson*, the defendant sought to appeal a denial of summary judgment based on the court's determination that there was a material factual dispute over the extent of the defendants' involvement in the alleged beating of the plaintiff. The Court held that a defendant who invokes a qualified immunity defense may not appeal a district court's denial of summary judgment insofar as the court's order determines that the record before it presents a genuine issue of fact for trial. *Johnson*, 515 U.S. at 320. In reaching this decision, the Court distinguished the situation before it from one where a purely legal matter was at issue, finding that, in the later situation, appellate jurisdiction is warranted. *Id.*

Further, in *Johnson*, this Court reasoned that "considerations of delay, comparative expertise of trial and appellate courts and wise use of appellate resources, argued in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law." *Id.* at 306. Because "questions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume an inordinate amount of appellate time," this Court ultimately held that a party invoking a qualify immunity defense "may not appeal a

district court's summary judgment order insofar as that Order determines whether or not the pre-trial record sets forth a 'genuine' issue of fact for trial." *Id.* at 307.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996) the Court attempted to clarify the jurisdictional boundaries set forth in *Johnson*, only to cause more confusion. In *Behrens*, the Court found that an appellate court could properly exercise jurisdiction under *Johnson* "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred." *Id.* at 313. The *Behrens* Court held that the appellate court properly could look to the evidence to determine whether the official's conduct was "objectively" reasonable under the standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This principle has encouraged appellate courts to engage in the sort of fact-sifting and credibility determinations that *Johnson* intended to prohibit. As a result, the Court in *Behrens* completely undermined the jurisdictional principles of *Johnson*, and added unneeded confusion to the jurisdictional inquiry.

The various and often contradictory applications of the principles set forth in *Johnson* by this Court and others suggests the need for some clear direction from this Court at this time. Indeed, the case law suggests that the barrage of interlocutory appeals in qualified immunity cases couched in terms of "abstract" issues of law have caused a waste of judicial resources which this Court attempted to curb by its jurisdictional guidelines in *Johnson*. Therefore, and in the spirit of *Johnson*, this Court's clarification on the jurisdictional

doctrines governing interlocutory appeals in this context is sorely needed.

B. *Circuit Court Decisions Under Johnson are Contradictory and Vary Widely*

Courts have reached contradictory results when applying the *Johnson* analysis, each grappling with the same issue: on what basis did the trial court preclude summary judgment, and is that basis sufficient to exercise jurisdiction of the appeal? The results of this analysis have varied widely among the circuits.

For example, the United States Court of Appeals for the Fourth Circuit properly applied the jurisdictional doctrine set forth in *Johnson* when it declined to exercise jurisdiction over an appeal that required the assessment of whether or not the defendant-police officers engaged in prohibited conduct. *Montrose v. Harrison*, Ca. No. 99-1240 2000 U.S. App. LEXIS 6917 (4th Cir. April 18, 2000). In *Montrose*, the lower court concluded that there were genuine issues of material fact that precluded summary judgment in favor of the police officer-defendants on the qualified immunity issue. In declining to exercise jurisdiction, the circuit court ruled that because the appeal did not raise the legal issue of whether their was violation of clearly established law, the court did not have jurisdiction over the issue of whether or not certain conduct occurred that may have violated that law.

Other courts similarly have held that the *Johnson* doctrine prohibits jurisdiction over orders denying summary judgment in qualified immunity

issues "if they are based on sufficiency of the evidence." *See Thibodeaux v. Harris County, Texas*, Ca. No. 99-21054 2000 U.S. App. LEXIS 15615 (5th Cir. July 6, 2000). In *Ruffino v. Sheahan*, Ca. No. 99-2981 2000 U.S. App. LEXIS 14663 (7th Cir. June 27, 2000) the court properly dismissed the appeal under *Johnson* by finding that "nothing but fact finding will resolve" the issues that gave rise to the defendants' qualified immunity defense. In doing so, the court stated that "the issue before us is qualified immunity; the appeal is interlocutory; and its resolution depends on disputed issues of fact." *Id.* The court further found that this Court's decision in *Johnson* required the court to dismiss the appeal on this basis.

In contrast, applying this same principle, in *Boyd v. Baeppler*, Ca. No. 99-3234 2000 U.S. App. LEXIS 12201 (6th Cir. June 6, 2000), the United States Court of Appeals for the Sixth Circuit exercised jurisdiction under the *Johnson* doctrine purportedly over the "legal question" of qualified immunity.[1] In that case, the plaintiff argued that the court lacked jurisdiction because the district court denied summary judgment to defendants on the qualified immunity

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[1] Circuit courts have attempted to clearly delineate the truly legal questions that justify appellant review of denials for summary judgment on qualified immunity issues under *Johnson*. For example, in *Martinez v. Simonetti*, 202 F.3d 625 (2nd Cir. 2000), the court stated that "in the qualified immunity context, purely legal questions may include, *inter alia*, whether plaintiffs have asserted a violation of a federally protected right in the first instance, whether that right was clearly established at the time of the challenged conduct, and whether the facts as alleged demonstrate the objective reasonableness of the public official's conduct." (Citations omitted). While sensible in principle, and in fact on paper, the application of this rule has hardly been consistent.

issue, finding that "genuine issues of fact" existed as to the use of deadly force. The defendants argued that "the genuine issues of fact found by the district court are not genuine or material, and that this appeal presents purely legal questions based on essentially uncontroverted material facts." The court agreed, and essentially exercised jurisdiction in order to determine the sufficiency of the facts found by the district court.

The dissent in *Boyd* is instructive, and clearly indicative of the confusion among the circuits regarding the jurisdictional issue. In *Boyd*, the dissent argued that the majority improperly exercised jurisdiction under *Johnson* when it discounted the plaintiff's evidence suggesting the existence of genuine issues of material fact. In doing so, the dissent emphasized the fact that the majority analyzed the immediate circumstances of the decedent's death and necessarily made a credibility determination as to the surviving eye witnesses. The dissent further noted that this credibility determination is something that the law of summary judgment forbids the appellate court to do.

To determine the jurisdictional issue, other courts have simply focused on the reasons set forth by the trial court in denying summary judgment. For example, in *Shinalut v. The Cleveland County Board of County Commissioners*, 82 F.3d 367 (10th Cir. 1996), the court declined to exercise jurisdiction over the defendant's interlocutory appeal of the denial of qualified immunity. In doing so, the appellate court looked to the district court's opinion to determine on what basis summary judgment was denied. The court found that the district court determined that there was a "genuine issue of material fact" as to the defendant's

motive for engaging in the conduct that gave rise to the section 1983 action. Because the defendant contested the district court's factual determination, the court declined to exercise jurisdiction to review the interlocutory appeal under *Johnson*.

This same result was reached by the United States Court of Appeals for the Second Circuit in *Dyer v. County of Suffolk*, Ca. No. 99-9255 2000 U.S. App. LEXIS 8804 (2nd Cir. May 2, 2000). In that case the parties vigorously contested the facts and, on that basis, the district court denied defendant's motion to dismiss on the basis of qualified immunity. The court declined to exercise jurisdiction over the appeal because the denial of summary judgment was premised on the contention that the evidence "fails to prove the alleged wrongful conduct." *Id.* (citations omitted). The defendants argued in favor of jurisdiction by contending that "determinations of evidentiary sufficiency are immediately appealable if the defendant is willing to stipulate to the plaintiff's version of the facts for the purposes of the appeal." The court rejected this contention, finding that because the material facts were in serious dispute, the court lacked jurisdiction to hear the appeal on the qualified immunity issue.

C. *The United States Court of Appeals for the Third Circuit Erred by Weighing Evidence and Sifting Facts*

Although the trial court's opinion clearly stated the basis on which summary judgment was denied, i.e., the existence of genuine issues of fact, the United States Court of Appeals for the Third Circuit simply

paid lip-service to the jurisdictional mandates established by *Johnson* in this case while it completely denigrated the doctrine by engaging in the fact-sifting exercise that *Johnson* clearly prohibits. On the motion for summary judgment, the United States District Court for the Middle District of Pennsylvania denied the Respondents' qualified immunity arguments because it found that manifold genuine disputed issues of material fact existed that were sufficient to preclude summary judgment on that defense.

Specifically, the trial court's basis for rejecting Respondents' summary judgment motion with regard to the Petitioner's excessive force, false arrest and retaliatory prosecution claims was entirely based on the evaluation of the factual record and the determination that sufficient disputed genuine material fact issues existed. The trial court's basis for denying Respondents' summary judgment claim was not based on any legal issues, *e.g.*, whether the First Amendment rights were clearly established. Rather, in denying summary judgment, the trial court identified genuine issues of fact that would be appropriately presented to a jury at trial, that is, exactly what information had passed from the prosecuting officer Hontz to the County Prosecutor's office as well as the ultimate factual question of why the filing of the assault charges against Petitioner was delayed more than six (6) months until after Petitioner had submitted through counsel a tort notice protecting her right to sue the Commonwealth of Pennsylvania pursuant to 42 Pa. C.S.A. § 5522. The Third Circuit improperly made this factual determination, a decision that clearly was within the province of the jury.

The trial court's denial of summary judgment was not premised on any legal determination but was instead wholly rooted on findings that the record presented sufficient disputed issues of material fact. Its reasons for doing so are clearly set forth in its opinion. This is in direct contravention to *Johnson*. Indeed, under *Johnson*, no jurisdiction lies to immediately appeal the fact-related district court's determination on the qualified immunity issue raised by Respondents in the summary judgment motion. Only qualified immunity issues which have been denied on summary judgment for more "abstract" legal reasons are immediately appealable. *Id.* In this case, the trial court below ruled on the sufficiency of evidence and identified manifold areas of genuine disputed material facts. Therefore, the Third Circuit erred by finding jurisdiction to review the issue raised by the Respondents on appeal.

There are numerous examples where the Third Circuit weighed the evidence of record and sifted through the disputed facts as prohibited by *Johnson*. Indeed, the Third Circuit's approach apparently involved ruling out consideration of much of the record and sifting through only a partial record by weighing the facts and ruling on the credibility of witnesses, all performed in contravention of this Court's clear mandate in *Johnson*, to conclude that summary judgment was appropriate on the Respondents' qualified immunity defense.

By evaluating portions of the record in this case and weighing the disputed issues of fact which were conclusively found at the trial court level, the Third Circuit completely undermined the doctrine set forth in

Johnson. The jurisdictional issue is particularly suitable for this Court to address here because the issue has been, and continues to be, raised time and time again with courts reaching various results and yet purporting to apply the same doctrine in doing so. Here, the Third Circuit, *en banc*, reached the wrong decision. The court in reaching its decision engaged in fact sifting and weighed the credibility of the testimony of the officers as well as the Petitioners. It clearly ignored the reality, despite the Respondents' arguments to the contrary, that the jurisdictional basis for the appeal was simply a "sufficiency determination" of the type expressly precluded by *Johnson*. There was no claim that an abstract issue of law was at the heart of the appeal. There was no contention as to whether any particular right in question was clearly established. As this Court stated, determinations of evidentiary sufficiency are not immediately appealable because they simply arise in a qualified immunity case. Therefore, the Third Circuit clearly erred in exercising jurisdiction over this appeal, because, in doing so, it ultimately deprived Petitioner of her right to have the evidence heard and weighed by a jury.

In this case, there was myriad evidence in the record which the jury was entitled to weigh in order to determine the qualified immunity issue. The Third Circuit's exercise of jurisdiction precluded the jury from doing so. Other courts have similarly overstepped the jurisdictional boundaries set forth in *Johnson*. Given the dire need for this Court's direction on the significant qualified immunity and federal civil procedure issues as set forth above, Petitioners respectfully request that the court grant their petition for writ of *certiorari*.

II. *CERTIORARI* SHOULD BE GRANTED TO DETERMINE THE ISSUE OF WHETHER AN INQUIRY INTO THE SUBJECTIVE INTENT OF THE OFFICIAL IS AN APPROPRIATE CONSIDERATION FOR THE PURPOSE OF DETERMINING WHETHER AN OFFICIAL IS ENTITLED TO QUALIFIED IMMUNITY IN A FIRST AMENDMENT RETALIATION CASE AGAINST A GOVERNMENT OFFICIAL.

Certiorari is appropriate in this case for another reason. It is necessary for this Court to decide whether a government officer who is a defendant in a motive-based tort suit is entitled to qualified immunity from suit if he can offer a legitimate reason, and the plaintiff is unable to establish that the offered reason actually is a pretext. The issue is one regarding the necessary inquiry into the subjective intent of the governmental actor in motive-based torts. This issue is now ripe for resolution by this Court.

Indeed, this question was raised by but not addressed in this Court's decision in the *Crawford-El* case. As Chief Justice Rehnquist acknowledged in his dissent in the *Crawford* case, this Court has never explicitly ruled on the question at all. 523 U.S. at 601. However, the Chief Justice noted in his dissent that because the clarification did not occur as it should have in *Crawford-El*, "under the court's view, only a fact finder's ultimate determination of the motive with which he acted would resolve this case."

In *Harlow v. Fitzgerald*, this Court recognized the concept of qualified immunity which, if proven, would

"permit the defeat of insubstantial claims without resort to trial." 457 U.S. at 813. The *Harlow* case changed the doctrine of qualified immunity by eliminating inquiry into any subjective component on the government official's part, and turning the inquiry entirely on "objective reasonableness," to be measured by the state of law at the time of the challenged act. *Id.* at 819 (citation omitted). This case presents a unique opportunity for this Court to clarify the standard for qualified immunity under *Harlow* in the case of motive-based constitutional torts.

In the *Crawford-El* case, this Court held that in suits where constitutional claims asserted against a government employee and in which improper motive is an element, the plaintiff does not have to produce clear and convincing evidence of the improper motive in order to defeat a motion for summary judgment. In so doing, the Court rejected the notion that courts of appeal could create specific procedural rules in such cases to shield government officials from the burden and costs of litigation. In his dissenting opinion, Chief Justice Rehnquist, joined by Justice O'Connor, criticized the majority's failure to address the second issue on which the court granted certiorari. While conceding that the majority extensively examined the first issue and ultimately concluded that the court's qualified immunity jurisprudence did not demand an enhanced evidentiary standard, the Chief Justice noted the majority's failure to consider the second issue (as set forth above) regarding qualified immunity because that question is a threshold issue that must be determined before consideration of plaintiff's claim.

This question remains unanswered.

In *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), the United States Court of Appeals for the First Circuit dismissed the challenge to the district court's denial of summary judgment on qualified immunity under *Johnson* finding that the lower court's decision was based upon significant controverted factual issues. While dismissing the appeal, the court addressed the merits of the defendants' arguments on the qualified immunity issue. In that case, defendants conceded that the law regarding politically-motivated terminations was clearly established at the time. The defendants argued, however, that they had legitimate reasons for terminating the plaintiffs under a layoff plan according to objective criteria. In their brief, the defendants listed several uncontested facts regarding the layoff process that demonstrated that they had established that their conduct was "objectively reasonable" under *Harlow*. The First Circuit rejected this argument. In doing so, the court stated that the plaintiff should have the opportunity to present evidence of subjective motivation or intent, because motivation or intent is an element of the cause of action.

The Third Circuit did not follow this direction. In this case, the district court considered evidence concerning motivation in finding that a genuine issue of material fact existed sufficient to preclude summary judgment on Respondents' qualified immunity defense. The Third Circuit ignored the evidence. Indeed, here, there was evidence in the record demonstrating that the officer's act in filing charges against Mrs. Griest was pretextual and that he in fact filed criminal charges against Mrs. Griest in retaliation for her having exercised her First Amendment rights. The Third Circuit was mistaken when it held that the she failed to

produce sufficient evidence to support either an objective or subjective finding of retaliatory animus on the part of the prosecuting officer in this case. The jury should have had the opportunity to make the ultimate determination of the motive with which the officer acted in order to resolve the case. The Third Circuit prohibited the fact-finder from doing so.

The Third Circuit even failed to follow its own precedent in making its determination. Specifically, in *Grant v. City of Pittsburgh*, 98 F.3d 116 (3rd Cir. 1996), the Third Circuit held that a subjective inquiry into defendant's state of mind is proper where the defendant's intent or motivation is now an element of the underlying tort claim. In that case, the court reasoned that a "purely objective inquiry adovacted by... defendants would essentially insulate government officials from liability for the very harm our substantive due process precedents have sought to redress: using government authority to take actions that because of the improper motives of public officials, have no rational relationship to legitimate government purposes." *Id.* at 125. By taking the question of subjective intent away from the jury, the Third Circuit did violence to *Grant*.

Because, as Justice Rehnquist indicated in his dissent in *Crawford*, courts have no direction concerning the proper inquiry to be made into the subjective state of mind of the public official in this context, guidance from this Court is needed. In a case such as this, where a genuine issue of fact exists as to the public official's state of mind, it was improper for the circuit court to preclude a jury from hearing such evidence. The Third Circuit's decision in this case is in direct contravention to the First Circuit's decision in the

Garcia case (as well as its own precedent) where that court determined that evidence would lead into the public official's motivation as a factual matter and cannot form the basis of an appeal from the denial of summary judgment. 204 F.3d *at* 12. Such a question is clearly one for the jury.

Because of the confusion surrounding the inquiry into a public official's subjective intent in the qualified immunity analysis for motive-based constitutional torts, the Griests respectfully request that this Court provide the clarification necessary. This Court accepted certiorari on this issue in *Crawford-El* but failed to address it. This case presents a particularly appropriate opportunity for this Court to revisit, and conclusively decide, this issue.

CONCLUSION

The circumstances present in this case will give the Court the opportunity to provide the much needed guidance in two (2) crucial aspects of the qualified immunity analysis and, in effect, resolve a conflict amongst the Circuit Courts on an important summary judgment issue. Indeed, the divergent results reached by circuit courts across the nation as well as the incorrect result reached by the circuit court below requires this Court to provide the direction necessary to give purpose and meaning to the principles set forth in *Johnson*. Moreover, it is necessary for the Court to address the issue of "subjective intent" that was raised but not decided in *Crawford-El*. The Court may properly do so here.

Both issues presented in this case are

particularly important issues in federal civil procedure as well as constitutional law. As long as this confusion remains, lower courts will struggle with the jurisdictional doctrine set forth in *Johnson* as well as the "subjective inquiry" that went unaddressed by *Crawford-El* with the inevitable result that the outcomes of future cases will continue to differ dramatically. This Court should grant *certiorari* in order to establish a uniform, national rule on these important issues.

For these reasons, petitioners Mr. and Mrs. Griest respectfully request that this Court grant their petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

s/_____
David W. Wolf, Esquire
Counsel for Petitioner

The Law Offices of David W. Wolf
225 South Fifteenth Street, Suite 805
Philadelphia, Pennsylvania 19102
(215) 546-7450

Dated: September 21, 2000.

No. _____

In The

Supreme Court of the United States

Kathleen Griest and George Griest,

Petitioners,

v.

Andrew Edward Canepa, P.S.P.; Jeffrey E. Hontz, P.S.P.; Commonwealth of Pennsylvania; Paul J. Evanko, the Commissioner of the Pennsylvania State Police in His Individual Capacity; Glenn Walp, the Former Commissioner of the Pennsylvania State Police in his Individual Capacity,

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On Petition for a Writ of *Certiorari* to the United States
Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR A WRIT OF *CERTIORARI*

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3319

Kathleen Griest; George Griest

v.

Andrew Edward Canepa, P.S.P.; Jeffrey E. Hontz, P.S.P.; Commonwealth of Pennsylvania; Paul J. Evanko, the Commissioner of the Pennsylvania State Police in His Individual Capacity; Glenn Walp, the former Commissioner of the Pennsylvania State Police in his Individual Capacity,

Andrew Edward Canepa
and Jeffrey E. Hontz,

Appellants

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil No. 97-cv-00568) District Judge: Magistrate Raymond J. Durkin

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Argued: November 2, 1999

Before: GREENBERG, SCIRICA and RENDELL,

Circuit Judges

(Filed March 22, 2000)

Daniel J. Doyle [ARGUED]
Office of Attorney General
Strawberry Square, 15th Floor
Harrisburg, PA 17120
Attorneys for Appellants

David W. Wolf [ARGUED]
225 South 15th Street
Philadelphia, PA 19102
Counsel for Appellees

OPINION

RENDELL, Circuit Judge.

Plaintiff Kathleen Griest, along with her husband George Griest, brought an eight count complaint against Andrew Canepa, a Pennsylvania State Police trooper, and Jeffrey Hontz, a now-retired trooper, arising out of a roadside incident on April 13, 1995 and the subsequent filing of criminal charges against Kathleen Griest. Hontz and Canepa filed a motion for summary judgment, which was granted with respect to certain counts of the complaint, but was denied with respect to their affirmative defense of qualified immunity. Canepa and Hontz appeal the denial of summary judgment based on qualified immunity.

For the reasons stated below, we will affirm the denial of summary judgment with respect to the excessive force claim against Canepa. We will reverse the denial of summary judgment with respect to Hontz and with respect to the Fourth Amendment unlawful arrest claim against Canepa.

Jurisdiction

Although not entirely clear, the District Court's[2] ruling appeared to be based on qualified immunity, concluding that there were issues of fact which

[2] We will refer to the District Court, although the actual opinion leading to this appeal was drafted by the Magistrate Judge.

precluded the grant of summary judgment in favor of Canepa and Hontz on the basis of qualified immunity.

Our jurisdiction to hear appeals from the denial of summary judgment brought on the basis of qualified immunity is not clear-cut. We note, therefore, at the outset that the defendants are not contesting the facts but, rather, are willing to concede Griest's version, and thus we have jurisdiction to hear this appeal under 2 8 U. S.C. § 12 91 pursuant to the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (rejection of qualified immunity defense is a final decision to the extent it turns on an issue of law); *Torres v. United States*, 200 F.3d 179, 184 (3d Cir. 1999); *Mellott v. Heemer*, 161 F.3d 117, 121 (3d Cir. 1998). Thus, we disagree with Griest's position that the Supreme Court's decision in *Johnson v. Jones* prevents us from exercising jurisdiction over this appeal. *See Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, the Supreme Court considered the appealability of a portion of a district court's order denying summary judgment on qualified immunity grounds based on "evidence sufficiency," the outcome of which depended on "which facts a party may, or may not, be able to prove at trial," and concluded that such an order is non-appealable. Id., at 313. *Johnson* essentially was a case in which the government disputed the plaintiff's version of the facts by urging "we did not do it." The Supreme Court's subsequent decision in *Behrens v. Pelletier* reminds us not to read *Johnson*'s conclusion of non-appealability too expansively:

> [R]espondent asserts that appeal of denial of

> the summary judgment motion is not available because the denial rested on the ground that "material issues of fact remain." . . . *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff s claim, and hence there is no "final decision" . . . . *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issue of law" relating to qualified immunity . . . . *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported met the *Harlow* standard of "objective legal reasonableness."

Behrens v. Pelletier, 516 U.S. 299, 312-313 (1996).

Unlike *Johnson*, we do not have a "we did not do it" defense before us. Canepa and Hontz do not ask us to consider whether the evidence could support a finding that particular conduct occurred. Instead, Canepa and Hontz argue that they are entitled to qualified immunity as a matter of law even conceding that the

evidence supports the conduct as Griest presents it. Therefore, nothing in *Johnson* affects the application of *Mitchell* to this appeal, which entails a legal determination, and we exercise plenary review over the District Court's denial of summary judgment on qualified immunity grounds. *See Torres*, 200 F.3d at 184.

Qualified Immunity

Government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Before undertaking this analysis, however, a court evaluating an assertion of qualified immunity must first determine whether the plaintiff has alleged a constitutional deprivation at all. *See Wilson v. Layne*, 119 S. Ct. 1692, 1697 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998) ("as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question") (citing *Siegert v. Gilley*, 500U.S.226,232(1991)). If this threshold inquiry is answered in the affirmative, the issues of whether the constitutional right was clearly established at the time of the incident, and whether the actions of an officer were objectively reasonable, are then questions of law for the court. *See Sharrar v. Felsing*, 128 F.3d 810,

826-828 (3d Cir. 1997) ("Only if the historical facts material to the latter issue are in dispute . . . will there be an issue for the jury. The reasonableness of the officers' belief or actions is not a jury question"). The contours of the right allegedly violated must be clearly established in a particularized fashion. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("in light of pre-existing law the unlawfulness must be apparent").

Procedural Status

The parties are all too familiar with the events of the morning of April 13, 1995, as well as the varying versions of the facts that have been portrayed in depositions and during the course of criminal prosecution, by Griest, her daughter Kathleen Williams, Canepa, Hontz, and others. We will resist the temptation to recount all the facts (and versions) except as may be necessary to our ruling.

We note at the outset that our review of the denial of summary judgment is complicated by virtue of the fact that the District Court did not squarely address the threshold inquiry for deciding qualified immunity issues, namely, whether Griest's constitutional rights were violated at all. The conduct and rights were discussed in general terms, but the District Court made no ruling on that issue. This renders the qualified immunity inquiry - *e.g.*, whether the right was "clearly established" and whether an officer would reasonably have known his conduct was unlawful - somewhat problematic, as it would require that we start midstream without having established that the right in fact exists in the given factual setting.

Nonetheless, and while we agree with the District Court that many of the facts are disputed, we discern a basis for holding that the grant of qualified immunity as to some of Griest's claims should have been determined in favor of Canepa or Hontz based on the record before the District Court under Griest's version of the facts.

QUALIFIED IMMUNITY OF CANEPA

Griest's claim against Canepa can be divided into a Fourth Amendment unlawful arrest claim and an excessive force claim. We parse the factual events into the "arrest," which would consist of Canepa's taking of the keys and preventing of Griest's attempt to walk down the highway, and separate that from an excessive force claim, which we view as entailing Canepa's use of handcuffs and his related physical encounters with Griest in the given factual setting.

Although the District Court did not take the step that should precede the determination of qualified immunity, namely examining whether there was a constitutional violation at all, we nonetheless can resolve the improper arrest claim because, even under Griest's version of the facts, we find that no rational jury could determine that Canepa committed a Fourth Amendment violation by taking Griest's keys and preventing her from walking down the highway to the hospital. Viewing the evidence in the light most favorable to Griest, it is clear that Canepa was merely preventing Griest from hurting herself, and perhaps others, in a potentially dangerous situation. A very sick woman was driving a car; when she got out of the car, she announced her intention to walk down the

highway to the hospital. We cannot conclude that Canepa's conduct constituted an unlawful arrest , violative of the Fourth Amendment, as Griest alleges. *See generally County of Sacramento*, 523 U.S. at 844; *California v. Hodari D.*, 499 U.S. 621, 624-627 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 596-597 (1989) ("'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable'"). Moreover, were we to assume, for purposes of the qualified immunity analysis, that a constitutional violation had occurred, we nonetheless would conclude that Canepa was entitled to qualified immunity on the arrest claim. Not only was Griest's right to be free in that setting not clearly established at the time of the incident, but, in addition, it was objectively reasonable for Canepa to believe that it was lawful (perhaps even mandatory) to prevent a very sick woman from driving or walking down the shoulder of the highway early in the morning.[3] Canepa would have been justified in believing that he was acting lawfully in preventing Griest, as he did, from driving her automobile and walking down the shoulder of a highway.

Canepa's use of handcuffs and physical contact to restrain Griest, however, is a different matter. The

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[3] Indeed, we have since held that police officers may be held responsible for civil rights violations when they *fail* to avert a danger to those with whom they come into contact. *See Kniepp v. Tedder*, 95 F.3d 1199, 1201 (3d Cir. 1996) (adopting the state created danger theory and holding that the facts, if proven, "sustain a prima facie case of a violation of Kneipp's Fourteenth Amendment substantive due process and her liberty interest in personal security under the theory that city police officers increased the risk of harm to Kniepp which ultimately resulted in the severe damages she sustained").

validity of an excessive force claim is to be measured by reference to the specific constitutional standard governing that right -- in this instance, the Fourth Amendment - not a generalized excessive force standard. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). Whether use of force is reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396; *Mellott v. Heemer*, 161 F.3d at 122 (requiring consideration of facts and circumstances of each particular case, including "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight") (citing *Graham*, 490 U.S. at 396); *Groman v. Township of Manalapan*, 47 F.3d 628, 633-634 (3d Cir. 1995); *Baker v. Monroe Township*, 50 F.3d 11 86, 1193 (3d Cir. 1994).

Even if we assume Griest's versions of the facts, considering her own conduct as well as the unique situation confronting Canepa, we believe it appropriate for a jury to determine in the first instance whether the force employed by Canepa was excessive. Plaintiff's version of what occurred contains within it some genuine issues as to the precise sequence of events and the degree of resistance, or aggression, she asserted.[4]

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[4] Williams, Griest's daughter, provided deposition testimony, relevant to the excessive force claim, which contradicts her testimony at Griest's criminal hearing. We cannot tell, based on the state of this record, whether Williams is Griest's witness, nor will we determine in the first instance whether her deposition testimony should be credited in light of the fact that she gave conflicting testimony at the criminal hearing.

We therefore will affirm the District Court in this regard, and remand so that this threshold issue can properly be determined by a jury. *See, e.g., Groman*, 47 F.3d at 634 (given the existence of material issues of disputed fact with respect to whether officer hit plaintiff while plaintiff was suffering from a minor stroke and that plaintiff's "obstreperous behavior" did not justify the officer's reaction, a jury could decide that excessive force was used); *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) ("it seems clear that the jury should have been permitted to decide whether the troopers' use of force was excessive"). *Cf. Doby v. DeCrescenzo*, 171 F.3d 858, 874 (3d Cir. 1999) (upholding district court's entry of judgment on the pleadings, as no rational jury could find in plaintiff's favor on the excessive force claim, because plaintiff's own testimony, in which she admitted she kicked the officers and screamed, establishes that officers' actions were reasonable under the circumstances).

Qualified Immunity of Hontz

Hontz argues that he is entitled to qualified immunity with respect to the retaliation claim against him based on his filing of criminal charges against Griest. Count V, "Unlawful Retaliation by Defendant Hontz Cognizable Under 42 U.S.C. Section 1983," asserts in pertinent part that:

> 39. In mid-October, 1995, Plaintiffs' counsel sent a tort claims notice to the Pennsylvania State Police Headquarters notifying the State Police that Plaintiffs intended to bring a legal action arising from the violations of Plaintiffs' civil rights on or

about April 13, 1995.

40. Thereafter, Defendant HONTZ swore out an affidavit of purported probable cause and commenced the unsuccessful prosecution of Plaintiff Mrs. Kathleen M. Griest.

41. The conduct of this Defendant HONTZ was as a direct result of his personal animus toward Plaintiff and/or a direct result of Plaintiff's filing of their statutory tort claim notice advising of their bringing of an action for civil rights violations against Defendants and, thus, this conduct and the entire institution of the prosecution against KATHLEEN M. GRIEST thereafter was therefore an unlawful and malicious attempt to harass, intimidate, and punish Plaintiffs for exercising their constitutional rights and was an oppressive and unlawful attempt to limit Plaintiffs' access to the courts, and Plaintiff MRS. KATHLEEN M. GRIEST was maliciously prosecuted, all in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983.

App. 23-24. As mentioned previously, the District Court denied summary judgment in part because "whether Hontz's action in bringing the charges were objectively reasonable presents questions of fact for the jury." Slip. Op. at 19. Our jurisprudence regarding retaliation claims provides some guidance for our review of this claim:

To state a claim for actionable retaliation

> under the First Amendment, the plaintiff must allege facts which, if proven, would establish that the plaintiff's protected First Amendment activity was a "substantial or motivating factor in the alleged retaliatory action."

Larson v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 94 (3d Cir. 1998) (citing *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 829 (3d Cir. 1994), *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)).

> The government can avoid liability [on a retaliation claim) by proving that it would have made the same decision without the impermissible motive. Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.

Texas v. Lesage, 120 S. Ct. 467, 468 (1999). In essence, the defendant has the burden in a retaliation claim to "prove lack of but-for causation." *Suppan v. Dadonna*, 98-2129, 2000 U.S. App. LEXIS 1443 at *23 (3d Cir. Feb. 4, 2000) (amended Feb. 8, 2000).

Determining whether qualified immunity insulates a government official from liability on the retaliation claim is complicated by the fact that the retaliation claim involves motive or animus. We attempted to map out an approach in *Larson* when we stated that:

> The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful . . . . In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory.

Larson, 154 F.3d at 94.[3] Thus, if we find that Griest has alleged a constitutional violation, and that the right was clearly established at the time, we then would have to consider whether a reasonable officer in Hontz's position could have believed his motive was proper.

We conclude that Griest has not produced sufficient evidence to prove retaliatory behavior on the part of Hontz, and that even if she had, he would be entitled to qualified immunity. In her retaliation claim, and in her opposition to Hontz's claim of qualified immunity, Griest contends that her filing of a

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[3] In *Larson*, the plaintiff had not yet had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was retaliation rather than the legitimate reason proffered by the defendants. Because the decision made by appellants in that case could have been affected by a retaliatory motive, we stated that "we cannot conclude from the face of the pleadings that appellants would have taken the same action in the absence of protected speech." Larson, 154 F.3d at 95. Unlike in *Larson*, we are confronted with the issue of Hontz's qualified immunity in the context of summary judgment after discovery has been taken and closed, and thus we have the benefit of a full record.

complaint against the police was a motivating factor in Hontz's filing of criminal charges against her. However, Griest acknowledges that the investigation of Griest's actions on April 13, 1995 began on the very day of the incident, many months before the issuance of the tort notice. After the incident, Corporal Werts instructed Hontz to initiate an investigation and file assault charges against Griest.[6] It also is undisputed that Hontz contacted Griest's husband, attorney, and physician shortly after the April 1995 incident in connection with the investigation. Griest's doctor told Hontz that Griest was hospitalized. Hontz obtained another status report from Griest's physician in August to determine whether Griest had regained health, and discovered that she was no longer hospitalized but still was not in good condition, and would experience a setback if she were to face criminal charges. After being informed of this development, Skutnik told Hontz to refrain from bringing the charges.

Griest's claim of retaliation is weakened by the fact that the investigation process was underway, and claims contemplated, months before it was actually filed. That it was not filed until the fall of 1995, after Griest's tort notice was sent, would appear to be explained by the course of events set into motion by the officers' concern for Griest's health. The timing alone is insufficient here to prove causation due to the presence of other facts negating causation and the

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[6] Griest contends that ambulance personnel overheard Griest state her intention to sue on the date of the incident. Brief for Appellees at 37. Even if that is true, it does not support the inference, let alone the conclusion, that Hontz, Werts, Gerkovich, or Canepa heard that statement or acted upon it.

absence of facts that would be probative of causation. *See generally Farrell v. Planters Lifesavers Co.*, 98-6410, 2000 U.S. App. LEXIS 3243 at *15 (3d Cir. March 3, 2000).

Hontz has provided specific evidence of his reason for filing, which is not controverted by Griest. Although Hontz was not legally required to obtain approval from the district attorney's office for the particular charges brought against Griest, the record indicates that attorneys from the district attorney's office directed the timing of the filing of the charges against Griest after Baranowski instructed Hontz to seek direction from Skutnik. Skutnik told Hontz to refrain from filing in August when Griest no longer was hospitalized but still was not well. After Hontz contacted Skutnik on Baranowski's direction, Skutnik told Hontz to go forward in October when it appeared Griest was well enough to institute legal action herself. Rodgers directed Hontz to amend and re-submit the criminal complaint when the District Justice rejected the aggravated assault charge. We find it objectively reasonable for Hontz to have followed the instructions of the district attorney's office to file the criminal charges when he did.

Griest argues that Hontz deliberately concealed or failed to disclose certain evidence to the prosecutorial authorities in his affidavit of probable cause, and his misleading affidavit reveals his retaliatory and improper purpose. According to Griest:

> Hontz's purported probable cause affidavit concealed not only the truth of Mrs. Griest's

> medical emergency but also hid the true circumstances of her being handcuffed and the fact that Tpr. Gerkovitch was able to reason with her by simply being compassionate. Subsequently, Hontz misrepresented Mrs. Griest as being *in the highway* [as opposed to being on the side of the highway] and in obvious danger. This conduct by Hontz leads to the conclusion that he acted with malice.

Brief for Appellees at 34. We cannot conceive that a rational jury could draw the inference urged by Griest because, even assuming that Hontz did not accurately represent all the facts as Griest alleges, the factual discrepancies identified by Griest are not material to the nature of the charges and therefore are not probative of a retaliatory motive in this case. Although we might hesitate if the averred facts diverged so markedly from those provided by Canepa as to call into question the factual basis for Hontz's affidavit, we cannot and will not draw the inferences Griest urges from what we can characterize as only minor variations in the papers that Hontz prepared. Hontz's account of the incident in the affidavit of probable cause is derived substantially from details provided by Canepa, although Hontz has acknowledged that some of the details he set forth may not accurately reflect Canepa's recollection. Griest's insinuations do not alter our view that a rational jury could not conclude from these inaccuracies that Hontz acted in retaliation for her sending of a tort notice.

Thus, even if Griest could show retaliation, Hontz

has demonstrated that he acted reasonably in relying on the directives of others in filing the action. First, he was entitled to rely on Canepa's statements regarding the incident and other information to formulate his conclusion that probable cause existed to file a criminal complaint against Griest. In *Rogers v. Powell*, we noted:

> [T]he actions of a police officer acting in reliance on what proves to be the flawed conclusions of a fellow police officer may be reasonable nonetheless and thus protected by the doctrine of qualified immunity . . . . We hold that where a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed.

Rogers v. Powell, 120 F.3d 446, 455 (3d Cir. 1997). Second, as previously mentioned, the uncontroverted evidence demonstrated that he was acting on the instructions of the district attorneys, and we believe he was objectively reasonable in so doing. Griest has not challenged these assertions with any argument or evidence to the contrary. Unlike the District Court, we do not see any facts of record, even viewed in the light most favorable to Griest, that could prove causation or that would preclude the recognition of qualified immunity to Hontz for his conduct in filing the charges

against Griest.[7] Griest's reliance on asserted omissions and mischaracterizations are not sufficiently probative to give us pause.

IV.

For the foregoing reasons, we AFFIRM the denial of summary judgment with respect to the excessive force claim against Canepa and remand for further proceedings; we REVERSE the denial of summary judgment with respect to Hontz; and we REVERSE the denial of summary judgment with respect to the Fourth Amendment improper arrest claim against Canepa.

TO THE CLERK OF COURT:

Please file the foregoing unreported-not precedential opinion.

s/M.O. Rendell
Circuit Judge

Dated: March 22, 2000

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[7] We also note that the District Court's statement of the issue, namely whether Hontz's actions in bringing the charges were objectively reasonable, was a bit oversimplified in light of the guidance provided in *Larson*.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3319

Kathleen Griest; George Griest

v.

Andrew Edward Canepa, P.S.P.; Jeffrey E. Hontz, P.S.P.; Commonwealth of Pennsylvania; Paul J. Evanko, the Commissioner of the Pennsylvania State Police in His Individual Capacity; Glenn Walp, the former Commissioner of the Pennsylvania State Police in his Individual Capacity,

Andrew Edward Canepa
and Jeffrey E. Hontz,

Appellants

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil No. 97-cv-00568) District Judge: Magistrate Raymond J. Durkin

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Argued: November 2, 1999
Before: GREENBERG, SCIRICA and RENDELL,

Present: Greenberg, Scirica, Rendell, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on November 2, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 12, 1999, be, and the same is hereby affirmed as to the denial of summary judgment with respect to the excessive force claim against Trooper Canepa and the cause is remanded for further proceedings; the judgment is reversed as to the denial of summary judgment with respect to Trooper Hontz; and the judgment is reversed as to the denial of summary judgment with respect to the Fourth Amendment improper arrest claim against Trooper Canepa. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marsia M. Waldron
Acting Clerk

Dated: March 22, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHLEEN GRIEST and GEORGE GRIEST	:	
	:	CIVIL ACTION NO. 97-0568
Plaintiff	:	
	:	(DURKIN, M.J.)
v.	:	
ANDREW EDWARD CANEPA, ET AL.,	:	
Defendants	:	

MEMORANDUM

Before the court is plaintiffs' motion for partial summary judgment (Doc. No. 22), and a motion for summary judgment by the remaining defendants, Canepa and Hontz. (Doc. No. 25).[8]

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[8] The amended complaint (Doc. No. 6) also named as defendants Paul Evanko, the Commissioner of the Pennsylvania State Police and Glenn Walp, the former commissioner. By stipulation of the parties, approved by the court, these defendants were dismissed from this action. (Doc. No. 26).

This is a federal civil rights[9] and pendent state law action brought by George and Kathleen Griest against Andrew Canepa, a trooper with the Pennsylvania State Police and Jeffrey Hontz, a retired Pennsylvania State trooper. The Griests allege that their rights were violated by Andrew Canepa when he placed handcuffs on Mrs. Griest during an incident on April 13, 1995 along State Route 33 in Monroe County. Jeffrey Hontz is alleged to have violated the Griests' rights when he filed criminal charges against Mrs. Griest in November 1995.

Count I is a "civil rights" count pursuant to 42 U.S.C. § 1983 in which it is alleged that the defendants deprived plaintiff Kathleen Griest of "those civil rights, privileges and immunity secured for her by the Constitution of the United States of America", although no specific constitutional provisions are referenced.

Count II is an excessive force claim against Canepa, apparently pursuant to 42 U.S.C. § 1983 as well as a state law claim of assault and battery against Canepa in connection with the alleged use of force.

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[9] Jurisdiction of the court is alleged to be invoked pursuant to "28 U.S.C. Section 2201 and 28 U.S.C. Section 2203". However, the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. creates no independent basis for federal jurisdiction but merely provides an additional remedy for disputes already within the realm of federal jurisdiction. Other sections of the complaint indicate that the federal claims are undoubtedly brought pursuant to jurisdiction conferred by 28 U.S.C. § 1343 over actions under 42 U.S.C. § 1983.

Count III is a "civil rights" and state law claim of false arrest and false imprisonment against Canepa.

Count IV is a "civil rights" and state law claim of malicious prosecution against Canepa and Hontz.

Count V is an unlawful retaliation claim against Hontz pursuant to 42 U.S.C. § 1983.

Count VI is a state law claim for negligent infliction of mental harm and distress brought by George Griest against Canepa and Hontz allegedly because he observed "substantial portions" of the actions by these defendants against his wife.

Count VII is a state law claim for intentional infliction of emotional distress brought by George Griest against Canepa and Hontz allegedly because he observed "substantial portions" of their actions against his wife.

Count VIII is a state law claim for loss of consortium by George Griest against Canepa and Hontz.

After completion of discovery, plaintiffs filed a motion for partial summary judgment in their favor on Count V of the amended complaint which asserts a claim of unlawful retaliatory prosecution under 42 U.S.C. § 1983. (Doc. No. 22). Plaintiffs subsequently filed a supporting brief (Doc. No. 33) to which defendants responded (Doc. No. 37) and plaintiffs filed a reply. (Doc. No. 39).

At the same time that plaintiffs' motion was filed, defendants filed a motion for summary judgment in their favor on all claims (Doc. No. 25) and subsequently filed a brief in support of the motion. (Doc. No. 34). Plaintiffs filed an opposing brief (Doc. No. 36) to which defendants filed a reply. (Doc. No. 40).

Both plaintiffs and defendants also filed statements of material facts, responses to the other parties' statement of material facts and documents supporting their respective motions and statements of material facts.

Rule 56(c) Fed.R.Civ.P., provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56 mandates the entry of judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact", since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient

showing of an essential element of its case with respect to which it has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Standards to determine whether a non-moving party has adduced sufficient evidence, either direct or circumstantial, to defeat a motion for summary judgment has been set forth in Williams v. Borough of Westchester, PA, 891 F.2d 458 (3d Cir. 1990) as follows:

> "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. ... "[The summary judgment] standard mirrors the standard for a directed verdict ... which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed. ... In essence ... the inquiry under each [standard] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

"Liberty Lobby, 477 U.S. at 248, 250, 251, 251-52. On the one hand, this standard makes clear that, even though the right to a jury trial is implicated, see id. at 267 . . . , a nonmoving party must adduce more than a mere scintilla of evidence in its favor, see 477 U.S. at 249, and cannot simply reassert factually unsupported allegations contained in its pleadings, see Celotex, 477 U.S. at 325. On the other hand, the standard purports to leave undisturbed the traditional rule that [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.' Liberty Lobby, 477 U.S. at 244. Summary judgment motions thus require judges to 'assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide,' id. at 265 ...., an inquiry that obviously must be done on a case-by-case basis.

"The inquiry becomes even more difficult when a defendant's liability turns on his or her state of mind.

On the other hand, as the 'reasonable jury, reference in Liberty Lobby suggests, circumstantial evidence alone must be sufficient to defeat summary judgment

> in some of these situations. Nothing in the trilogy suggests otherwise, and a contrary rule would immunize from trial all civil defendants who swear in affidavits that they lacked the requisite mental state, absent some rarely available 'smoking gun.' On the other hand, a nonmoving party in such a case cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit to that effect. '[D]iscredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion. Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' Liberty Lobby, 477 U.S. at 256-57 (emphasis added) (citation omitted). Such affirmative evidence regardless of whether it is direct or circumstantial must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance. Whether the quantum of circumstantial evidence is enough in any particular case to meet the standard quoted above often requires us to make difficult, fact-specific, perhaps somewhat arbitrary judgments."

(Footnotes omitted).

With the above principles in mind, the court will now set forth the allegations in the complaint, and the materials and arguments submitted in support of their respective positions and in opposition to the other parties' position.

Turning first to plaintiffs' motion for partial summary judgment, the parties do not appear to have any serious disagreement regarding the background facts which led up to the incident in question. Early in the morning of April 13, 1995, Mrs. Griest called her doctor's office and explained that she had tooth pain and had been vomiting all night. Her doctor, Dr. Cinelli, directed her to go to the hospital. The doctor testified that Mrs. Griest had been treated during the previous day for an abscessed tooth and he was concerned that she might be suffering from sepsis infection. She left her home in Sciota to proceed to the Muhlenberg Hospital. Mrs. Griest was driving and accompanied by her daughter, Mrs. Williams, who had stayed with her the previous evening. While on State Route 33 approximately one mile north of the Wind Gap exit, Mrs. Griest and Mrs. Williams saw an unmarked state police car along the berm of the road. Mrs. Griest pulled onto the berm in front of the car and Mrs. Williams got out of the car and approached the police car. Trooper Canepa was in the car at the time and was along the road because the car had run out of gas. He had transmitted a message to his station that he had broken down and, at the time the Griest vehicle pulled in front of him, he was awaiting assistance.

Mrs. Williams approached Canepa and told him her mother was in a lot of pain. As Canepa was looking into the situation, an altercation ensued and Mrs. Griest was handcuffed. Hontz was ordered to investigate the events leading to the altercation, and ultimately filed charges against Mrs. Griest. Both the plaintiffs, and defendants recognize that at this stage, the versions of the events as reported by the plaintiffs and the defendants begin to diverge. (Doc. No. 33, p. 3; Doc. No. 37, p. 3). Plaintiffs however, after stating "what is clear from the record", then sets forth plaintiffs' characterization of what appears to be many background facts from which the investigation and the ultimate charges filed against Kathleen Griest allegedly flowed. Plaintiffs also rely heavily on the timing of the filing of the charges as it relates to plaintiffs' issuance, through counsel, of a tort notice letter, as well as their contention that the probable cause affidavit filed in support of the charges was "false" in that it omitted such things as what Mrs. Williams told defendant Canepa upon their first speaking on April 13th, but rather included a misleading characterization that plaintiff at the time "wasn't acting properly" and a number of other "facts" as plaintiffs see them. However, defendants' version as to what occurred differs significantly from that set forth by plaintiffs. Plaintiffs' request for summary judgment involves the credibility of plaintiffs and their witness, together with inferences which may be drawn from this evidence, all which are essentially disputed by defendants. In short, plaintiffs are requesting that the court resolve issues of credibility and draw inferences on this motion for

summary judgment which the court cannot do. Rather, they are matters for the jury.

Although plaintiffs point to the "false" statements set forth in the probable cause affidavit, whether or not these are false or more importantly "misleading" as the plaintiffs would have it, also depends on accepting plaintiffs' version of the facts as they see them, which are matters for the jury and not for the court on a motion for summary judgment. Further, the timing of the filing of the charges compared with the issuance of the tort notice letter in itself does not indicate retaliation. The defendants have set forth their version of the facts as to why the filing of the charges was delayed including information that was received from Kathleen Griest's physician, the directions of the assistant district attorney handling the case, and the like. Once again, these matters are for the jury to decide on the question of retaliation. For this reason, the plaintiffs' motion for partial summary judgment on the retaliation count will be denied. In addition, for the same reasons, the defendants' request for summary judgment on this count will be denied. Both sides are presenting matters which are for the jury.

Turning now to defendants' motion for summary judgment. Defendants argue that summary judgment should be entered their favor on plaintiffs' state law claims based on the doctrine of sovereign immunity. Defendants argue that the Commonwealth of Pennsylvania is immune from suit except to the extent the general assembly has waived that immunity, 1

Pa.C.S. § 2310. They argue that the sovereign immunity bar extends to Commonwealth employees acting within the scope of their duties, and that none of the exceptions to sovereign immunity as set forth in 42 Pa.C.S. § 8522 are applicable in this action.

Plaintiffs respond that the conduct of defendants Canepa and Hontz can each be viewed as beyond the scope of their official duties because their actions were toward Kathleen Griest were outrageous' and were not in the accordance with appropriate state, police procedures. Plaintiffs argue that "seen in this perspective, there is no affront to the doctrine of sovereign immunity or the cases relied upon by defendant . . . by permitting the state law claims to remain in this litigation".

The plaintiffs have cited no authority for their position. Nevertheless, as defendants recognize, both the Commonwealth and its employees, acting within the scope of their duties, are immune from claims of this type. Shoop v. Dauphin County, 766 F.Supp. 1327, 1333-1334 (M.D. Pa. 1991). None of the claims fall within any exceptions to sovereign immunity. Although plaintiffs argue that the actions of Canepa and Hontz "can be viewed" as "outrageous" and therefore beyond the scope of their duties based on plaintiffs' version of the facts and/or inferences that could be drawn therefrom, as defendants argue, plaintiffs, in effect, are contending that a state employee only acts within this scope of his or her duty if he or she acts properly. However, the proper focus is

on what the employees were doing, not on how they were doing it.

Canepa was approached by plaintiffs' daughter and asked to assist a sick motorist who was not capable of driving, which is an action within the scope of his duties as a state police officer. Hontz was ordered by his superior to investigate and take action with regard to the altercation that followed. As defendants argue, even accepting as true that Canepa and Hontz had malicious motives toward Kathleen Griest, their actions were within their duties as commonwealth employees. Jones v. The Pennsylvania Minority Business Development Authority, 1998 W.L. 199653*2 (E.D. Pa. 1998). See also Pansy v. Preate, 870 F.Supp. 612, 626-627 (M.D. Pa. 1994), aff'd 61 F. 3d 896 (3d Cir. 1995) (Table); Shoop v. Dauphin County, supra. (Intentional tort notwithstanding, sovereign immunity still applied).

Defendants next argue that the claim by George Griest for loss of consortium as set forth in Count VIII cannot stand without a state law claim left upon which to base a loss of consortium. Defendants are correct. Under Pennsylvania law, a consortium claim derives only from the injured spouse's right to recover in tort. Quitmeyer v. SEPTA, 740 F.Supp. 363, 370 (E.D. Pa. 1990), citing Little v. Jarvis, 219 Pa. Super. 156, 162, 280 A.2d 617 (1971). The purpose of § 1983 was to provide a federal remedy for civil rights claims, not to provide a mechanism for vindication of state torts derived from another's § 1983 claim. Id., Wiers v. Barnes, 925 F.Supp. 1079, 1076 (D. Del. 1996).

Defendants cite no authority that the loss of consortium claim can stand if the state law claims are dismissed on the basis of sovereign immunity. Thus, Count VIII regarding loss of consortium will be dismissed.

With respect to the federal claims, Count II charges Canepa with "using the degree of force against her which was not calculated to end a disturbance, to restore order, or to effect an arrest, but was employed for the purpose of causing harm to plaintiff". Plaintiffs allege that this claim is asserted "under the Fourth, Fifth, Eighth and Fourteenth Amendments of the Constitution". Setting aside for the moment any Fourth Amendment claim against Canepa, defendants, citing Graham v. Connor, 490 U.S. 386 (1989) and Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) argue that all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop or other "seizure" of a free citizen could be-analyzed under the Fourth Amendment and its "reasonableness" standard. Defendants argue therefore that the Fifth, Eighth and Fourteenth Amendments have no application to Kathleen Griest's excessive force claim.

Plaintiff's do not directly refute defendants' argument that the Eighth Amendment has no application. Although plaintiffs, again relying on their version of the facts, state that Canepa's conduct in treating Kathleen Griest "like a criminal instead of a person in need of immediate medical assistance" might be found by a jury to be "deliberately indifferent"

conduct, they appear to argue that this conduct could amount to "gross negligence", which supports a Fifth and Fourteenth Amendment claim and that in addition, Kathleen Griest was "clearly seized, arrested and detained by Trooper Canepa through the physical instrumentality of removing Mrs. Griest's keys from her possession" and that therefore she was a pretrial detainee which would support the Fifth and Fourteenth Amendment due process claims regarding excessive force used against her.

When an excessive force claim arises in the context of an arrest or an investigatory stop of a free citizen, it is most properly characterized as one involving the protections of the Fourth Amendment, which guarantees citizens the right to be secure in their persons against unreasonable seizures of the person. Graham v. Connor, supra. Sharrar v. Felsing, 128 F.3d 810, 820 (3d Cir. 1997). Although plaintiff attempts to claim that the incident in this case is also a due process violation by virtue of the fact that Kathleen Griest was deprived of her keys and was therefore a pretrial detainee, in Graham v. Connor, the plaintiff was in the physical custody of the police when his head was slammed into the hood of a police car and he was pushed into its back seat. Despite this, the court held that the case was to be judged under the Fourth Amendment and not the Fifth or Fourteenth Amendment.

With respect to the plaintiffs' "gross negligence" theory which they argue would support the Fifth and Fourteenth Amendment claim under the facts as they

see them, plaintiffs argue that the Third Circuit has embraced a due process claim premised merely on gross negligence citing Metzger v. Osbeck, 841 F.2d 518, 520 n. 1 (3d Cir. 1988) and Colburn v. Upper Darby Township, 838 F.2d 663, 668 and n. 3 (3d Cir. 1988). However, in Fagen v. City of Vineland, 22 F.3d 1296, 1305 n. 5(3d Cir. 1994), the court noted that since the Supreme Court's 1989 opinion in Graham v. Connor, excessive force claims against the police are actionable under the Fourth Amendment rather than the substantive component of the due process clause. The court noted, however, where the excessive force does not involve a "seizure" by law enforcement officials, courts have held that a "shocks the conscience substantive due process claim survives Graham" citing Wilson v. Northcut, 987 F.2d 719, 722 (11th Cir. 1993). The Third Circuit did not refer to its prior "gross negligence" language in Metzger and Colburn, both of which preceded the decision in Graham v. Connor. Moreover, in Wilson, the case cited by the Third Circuit, The Eleventh Circuit specifically noted that it had not resolved the issue of whether gross negligence is sufficient to support a § 1983 claim against the state actor and declined to decide whether gross negligence would support such a claim. Plaintiffs have not argued that the evidence developed in discovery would support a "shocks the conscience" theory so as to give rise to a non-seizure due process claim. Thus, it does not appear that any Fifth and Fourteenth Amendment claims are properly in this case.

With respect to the Fourth Amendment excessive force claim against Canepa under Count II and apparently in connection with the false arrest claim against him in Count III, defendants argue that even if plaintiffs' versions of the facts were accepted as true, the actions of Canepa were reasonable and necessary in order to secure the safety of Mrs. Griest. Defendants argue that even if the court does not credit the testimony of Canepa that Kathleen Griest attacked him, Canepa was confronting a situation with a woman who was said to be sick, who refused to remove her keys from the ignition for no particular reason, who was verbally abusive, irrationally concluded she would walk to a hospital many miles away and who began walking along a four-laned limited access highway away from Trooper Canepa. Defendants argue that under these circumstances, Canepa had to restrain her for her own safety. Defendants argue that the question in an excessive force case is whether a police officer's action is objectively, not subjectively, reasonable under the facts and circumstances in the particular case, citing Graham v. Connor, supra, that intent and motive are inquiries which have no relationship to this issue and that in judging reasonableness, the court must keep in mind that police officers are often forced to make split second judgments.

Defendants argue that for the same reason, plaintiff Kathleen Griest's false arrest claim against Canepa must fail because the same action which formed the basis for the excessive force claim, the handcuffing, forms the basis for the false arrest claim. Defendants argue that although Kathleen Griest was

not arrested by Canepa in the sense that she was going to be charged with a crime, he did restrain her liberty briefly for the purpose of insuring her safety and the safety of others. Defendants argue that the restraint was brief as verified by Griest's daughter, and that a brief detention of a person to secure the person's safety is not unreasonable and does not run afoul of the 4th Amendment citing Baker v. Monroe Township, 50 F.3d 1186, 1192 (3d Cir. 1995). Defendants argue therefore that Trooper Canepa did not violate Griest's Fourth Amendment rights and summary judgment should be entered in his favor in Counts II and III.

Plaintiffs respond that Canepa initially seized and arrested Mrs. Griest not only when he applied physical force to her and handcuffed her, but also when he demanded and took her keys pursuant to the assertion of his police authority. Plaintiffs argue that under Brower v. Inyo County, 489 U.S. 593 (1989) and California v. Hodari D, 111 S.Ct. 1547, 1551 (1991), Canepa's taking of Kathleen Griest's keys from her while she was on a limited access highway and while in a state of physical distress which rendered her incapable of walking any distance satisfies the definition of a seizure with regard to plaintiffs' asserted claims. Plaintiffs argue that Kathleen Griest was not voluntarily detained by Trooper Canepa simply because she wanted an ambulance as defendant suggest, did not want to wait forty-five minutes to an hour for an ambulance from Allentown and an ambulance could have been ordered from a hospital which was much nearer, and certainly did not want to be handcuffed and made to wait on the side of Route 33 in the back of

a police vehicle for nearly an hour and then be taken to Muhlenberg Hospital Center. Plaintiffs' claim that these factors in addition to her version of the facts as set forth in the background section of her brief show an illegal arrest and seizure that are viable claims.

Comparison of the factual presentation relied on by each of the parties shows there are questions of facts with regard to the reasonableness of the actions of Canepa with respect to the claims set forth in Counts II and III of the complaint. Therefore, summary judgment is inappropriate.

With respect to excessive force claim in Count II of the amended complaint and the alleged improper arrest as set forth in Count III, it is noted that no claim is made against Hontz in Count II. Although Count III indicates that the conduct of Canepa constituted an arrest and detention of plaintiff, once again, Hontz is not mentioned in Count III. Count IV of the complaint, a malicious prosecution count, asserts that Hontz and Canepa arrested and charged Kathleen Griest without probable cause and for malicious reasons. Defendants move to dismiss the malicious prosecution claim against Hontz because Mrs. Griest was not seized by him and because Hontz did not make the decision to charge her.

In order to establish a claim for malicious prosecution under § 1983, plaintiffs must show that the defendants initiated a criminal proceeding, the criminal proceeding ended in Mrs. Griest's favor, the proceeding was initiated without probable cause, and

defendants acted maliciously and for improper purpose. Hilfirty v. Shipman, 91 F. 3d 573, 579 (3d Cir. 1996) . In addition, Mrs. Griest must also have been "seized". Torres v. McLaughlin, 9661 F.Supp. 1353, 1361, n.7 (E.D. Pa. 1997), rev'd on other grounds, 163 F. 3d 169 (3d Cir. 1998). Although as noted above, there would appear to be triable issues of fact as to whether Canepa engaged in a seizure of Kathleen Griest, plaintiffs in their briefs do not seem to argue that Canepa was involved in the events leading up to the subsequent prosecution of Mrs. Griest. (Doc. No. 36, pp. 14-15). Thus, it would appear that the claim in Count IV is not being pursued against Canepa.

With respect to Hontz, defendants argue that Hontz did not seize Mrs. Griest as that term is interpreted under the Fourth Amendment. Defendants argue she was not arrested by Hontz, not taken into custody, and not deprived of her liberty in any way other than she had to appear in court. Defendants argue that this restriction is not sufficient to amount to a seizure for purposes of the Fourth Amendment, citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

In that section of plaintiffs' responsive brief which addresses the question of whether there was a "seizure" insofar as Canepa is concerned, the plaintiffs argue that "Moreover, Mrs. Griest was technically rearrested by Trooper Hontz after he issued the criminal complaint and warrant and summoned Mrs. Griest to both the preliminary criminal hearing and, thereafter, to trial. (Doc. No. 36, p. 13). Plaintiffs cite

no authority for this argument. However, Hontz' action in causing Mrs. Griest to answer charges would not amount to a seizure. In addition to Gerstein v. Pugh, supra, in Torres v. McLaughlin, 966 F.Supp, supra at 1364, rev'd on other grounds, 163 F.3d 169 (3d Cir. 1998), the court held that having to appear in state court for preliminary hearings, arraignment and trial are "restraints" which do not amount to a "seizure". In Gallo v. City of Philadelphia, 161 F.3d 217 (3rd Cir. 1998), the court held that "although it is a close question", the combination of restrictions on Gallo following indictment, including the requirement that he post a $10,000.00 bond, attend all court hearings including trial and arraignment, and report to pretrial services on a weekly basis, and a prohibition from traveling outside New Jersey and Pennsylvania, amounted to a "seizure". There were no such restrictions in the instant case. There is no indication that there was any bail, restriction on travel or reporting to pre-trial services. Thus, the "combination" is missing from what the Third Circuit nevertheless felt was a "close question." The only charges that were ultimately filed were two simple assault charges and two disorderly conduct charges. At a preliminary hearing, the district justice dismissed the two simple assault charges and one disorderly conduct charge and indicated that he was prepared to proceed with the summary trial on the remaining disorderly conduct charge. However, both the assistant district attorney and defendant's counsel agreed to a continuance to a later date. Approximately one and a half months later, a "summary trial" was held on the remaining disorderly conduct charge and plaintiff was found not guilty.

Thus, without a seizure, there can be no civil right action for malicious prosecution against him, and the essential elements of the common law action for malicious prosecution need not be discussed. Torres, Gallo, supra.

Defendants next argue that summary judgment should be entered in favor of Trooper Hontz and Canepa because of the doctrine of qualified immunity. Defendants argue that neither Trooper Hontz in bringing the charges against Mrs. Griest nor Trooper Canepa in placing handcuffs on her, may be held liable because their actions were not in violation of any clearly established statutory or constitutional right. With respect to Hontz, defendants argue that certainly it was not clear that by preparing criminal complaint against Kathleen Griest, Trooper Hontz was seizing her for purposes of the Fourth Amendment nor was it clear that the charges were filed without probable cause since the district attorney thought that there was probable cause and even prosecuted the case. Defendants argue that Hontz, then, would have no reason to believe that there was an absence of probable cause and he would have no reason to believe that he was retaliating against Kathleen Griest simply because he followed the direction of the district attorney's office when he filed the charges in the case.

Summary judgment on the basis of qualified immunity is appropriate only if the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiffs and with all permissible inferences drawn in

their favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right. Davidson v. Scully, 114 F.3d. 12 (2d Cir. 1977). Roy v. Inhabitants of Lewistown, 42 F.3d 691, 695 (1st Cir. 1994). Although plaintiffs argue that Hontz would have no reason to believe that he engaged in a "seizure" or that there was an absence of probable cause, these issues relate primarily to the Count involving malicious prosecution and as noted above, Hontz cannot be charged with malicious prosecution under the facts presented by the parties. In that connection, plaintiffs appear to argue that Hontz' withholding of exculpatory information or furnishing "misleading" information to the district attorney is relevant not only to the malicious prosecution claim, but is also relevant to the retaliation claim, and thus, he is not shielded by the district attorney's approval of the charges. The Third Circuit has indicated that the withholding of exculpatory information will not always deprive a public official of qualified immunity. The court noted "after all, some information may be tangential or the prosecutor may obtain it from another source." Gallo v. City. of Philadelphia, 161 F.3d 217, 220 n.4 (3d Cir. 1998). However, defendants have not undertaken to demonstrate how plaintiffs' right to be free from retaliation was not a clearly established right and as noted above whether Hontz's action in bringing the charges were objectively reasonable presents questions of fact for the jury.

With respect to Trooper Canepa, defendants claim he was shielded from liability by the doctrine of qualified immunity since under the circumstances which confronted him at the time of the incidents, he reasonably acted to restrain Mrs. Griest. However, there is myriad of disputed facts going to the question of the reasonableness of Canepa in arresting Kathleen Griest and the force used in connection therewith. Thus, summary judgment is not proper on these claims as well. See Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); House v. New Castle County, 824 F.Supp. 477 (D. Del. 1993).

The net effect of the above is that at this point, the action shall proceed against Canepa on the federal false arrest excessive force claims, and against Hontz on the unlawful retaliatory prosecution claim.

An appropriate order will issue.

s/_____
RAYMOND J. DURKIN
United States Magistrate Judge

Dated: March 11, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHLEEN GRIEST and GEORGE GRIEST,	:	CIVIL ACTION NO. 97-0568
Plaintiff	:	(DURKIN, M.J.)
v.	:	
ANDREW EDWARD CANEPA, ET AL.,	:	
Defendants	:	

ORDER

In accordance with Memorandum this day filed, IT IS ORDERED THAT:

1. Plaintiffs' motion for partial summary judgment on Count V, unlawful retaliatory prosecution, (Doc. No. 22), is denied;

2. The motion for summary judgment of defendants Canepa and Hontz, (Doc. No. 25), is granted in part and denied in part:

(a) the motion is granted with respect to all state law claims including assault

and battery (Count II), false arrest and false imprisonment (Count III), malicious prosecution (Count IV), and negligent and intentional infliction of mental harm and distress (Counts VI and VII);

(b) the motion is granted with respect to loss of consortium (Count VIII);

(c) the motion is granted with respect to the federal excessive force claim against Canepa (Count II) insofar as the claim is made pursuant to the Fifth, Eighth and Fourteenth Amendments;

(d) the motion is granted with respect to the malicious prosecution claim against Hontz (Count IV);

(e) the motion is denied with respect to the federal Fourth Amendment excessive force (Count II) and false arrest (Count III) claims against Canepa;

(f) the motion is denied with respect to the retaliation claim against Hontz (Count V);

(g) the motion is denied with respect to the defense of the doctrine of qualified immunity; and,

(3) The final pre-trial conference is hereby scheduled for Tuesday, April 6, 1999 at 1:30 P.M. in Courtroom No. 2, Penn Place, 20 N. Pennsylvania Avenue, Wilkes-Barre, Pennsylvania.

s/
RAYMOND J. DURKIN
United States Magistrate Judge

Dated: March 11, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3319

KATHLEEN GRIEST; GEORGE GRIEST

v.

ANDREW EDWARD CANEPA, P.S.P.,
JEFFREY E. HONTZ, P.S.P.;
COMMONWEALTH OF PENNSYLVANIA;
PAUL J. EVANKO, The Commissioner of the
Pennsylvania State Police in his individual capacity;
GLENN WALP, The former Commissioner of the
Pennsylvania State Police in his individual capacity

ANDREW EDWARD CANEPA
and JEFFREY E. HONTZ,
Appellants

On Appeal from the United States District Court

for the Middle District of Pennsylvania
(D.C. Civil No. 97-cv-00568)
District Judge: Magistrate Judge Raymond J. Durkin

Present: BECKER, Chief Judge, SLOVITER,
MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, and BARRY, Circuit Judges

SUR PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

s/M.O. Rendell

Dated: April 28, 2000